APPEAL NO. 032228
FILED OCTOBER 9, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 24, 2003. The hearing officer resolved the disputed issues by deciding that appellant/cross-respondent (claimant) was not in the course and scope of employment when she was involved in a motor vehicle accident (MVA) on _____; that the employer did not tender a bona fide offer of employment (BFOE) to the claimant; and that the claimant did not have disability. The claimant appealed the determinations regarding course and scope of employment and disability. The carrier responded, urging affirmance of the determinations challenged by the claimant. The carrier appealed, disputing the determination regarding BFOE and the findings that the claimant sustained harm or damage to the physical structure of her body as a result of the MVA and that due to the injuries sustained in the MVA the claimant has been unable to obtain and retain employment at her preinjury wage from January 15, 2003, through the date of the CCH. The appeal file does not contain a response from the claimant.

DECISION

Affirmed.

COURSE AND SCOPE

It was undisputed that the claimant was involved in a MVA on _____. The claimant, a certified nurse's aide providing home health care for hospice patients, testified that the accident occurred while she was on her way from one patient's home to another's. The carrier contended that the claimant was on her way home at the time of the MVA. In evidence was a written statement from a coworker who commented that the claimant said she was returning to her home at the time of the MVA. Other coworkers testified that the claimant was not scheduled to make any additional visits after completing the last one prior to the MVA. The claimant testified that she was paid mileage for her travel.

Section 401.011(12)(A) provides that "course and scope of employment" does not include transportation to and from the place of employment unless the transportation is furnished as a part of the contract of employment or is paid for by the employer; the means of the transportation are under the control of the employer; or the employee is directed in the employee's employment to proceed from one place to another place. If an employee comes within one of the stated exceptions to the general "coming and going rule," the employee must still show that when the injury occurred the employee was furthering the affairs of the employer and thereby within the course and scope of employment. Texas Workers' Compensation Commission Appeal No. 010122, decided March 5, 2001, citing Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). In view of the evidence presented, the hearing officer could find, as he did, that

the claimant was on her way home at the time of the MVA. The hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986). Because the claimant was no longer furthering the affairs of the employer at the time of the accident, the resulting injury is not compensable.

BONA FIDE OFFER OF EMPLOYMENT

The carrier contends that the only standard for a BFOE is contained in Section 408.103(e) that "the claimant is reasonably capable of performing, given the physical condition of the employee and the geographic accessibility of the position to the employee." The carrier asserts that the Texas Workers' Compensation Commission cannot impose additional requirements for the bona fides of an employer's employment offer beyond those contemplated by the Texas Legislature and cites language from the preamble to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 129.6 (Rule 129.6). The Appeals Panel has previously considered and rejected this argument. In Texas Workers' Compensation Commission Appeal No. 010110-s, decided February 28, 2001, the Appeals Panel affirmed the determination of a hearing officer that the employer's offer of employment did not constitute a bona fide offer under Rule 129.6(c) because the written offer did not contain the statement required in Rule 129.6(c)(5) and because the Work Status Report (TWCC-73), upon which the offer was based, was not attached. Our decision observed that the language in Rule 129.6 is "clear and unambiguous" and that the rule "contains no exceptions for failing to strictly comply with its requirements." *See also,* Texas Workers' Compensation Commission Appeal No. 010301, decided March 20, 2001; Texas Workers' Compensation Commission Appeal No. 011604, decided August 14, 2001; and Texas Workers' Compensation Commission Appeal No. 011878-s, decided September 28, 2001. In Texas Workers' Compensation Commission Appeal No. 012088, decided October 17, 2001, the Appeals Panel reversed and rendered a new decision that the employer had not made a bona fide offer of modified employment because the written offer failed to include all the requirements of Rule 126.9(c). The decision in that case stated that "[t]he Appeals Panel, mindful of the admonition in the case of Rodriguez v. Service Lloyds Insurance Company, 997 S.W.2d 248 (Tex. 1999), has held that all of the elements set forth in Rule 129.6(c) must be present for the offer to be considered a [BFOE]." Accordingly, we affirm the determination that the employer did not tender a BFOE to the claimant.

DISABILITY

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. Although the evidence was conflicting, there is sufficient evidence to support the finding of facts challenged by the carrier that the claimant sustained harm or damage to the physical structure of her body as a result of the MVA and that due to the injuries sustained in the MVA on _____, the claimant has been unable to obtain and retain employment at her pre-injury wage from January 15, 2003, through the date of the CCH. However, the

1989 Act requires the existence of a compensable injury as a prerequisite to a finding of disability. Section 401.011(16). Because we have affirmed the determination that the claimant was not in the course and scope of employment and therefore cannot have a compensable injury, we likewise affirm the determination that she did not have disability.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **SENTRY INSURANCE A MUTUAL COMPANY** and the name and address of its registered agent for service of process is

GAIL L. ESTES
1525 NORTH INTERSTATE 35E, SUITE 220
CARROLLTON, TEXAS 75006.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Judy L. S. Barnes
Appeals Judge

_____
Chris Cowan
Appeals Judge